

# **EXHIBIT**

# **D**

74R6TANC

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

05 CR 621 (KMK)

5 ALBERTO VILAR and GARY TANAKA,

6 Defendants.

7 -----X

8 New York, N.Y.  
9 April 27, 2007  
11:15 a.m.

10 Before:

11 HON. KENNETH M. KARAS,

12 District Judge

13  
14 APPEARANCES

15 MICHAEL J. GARCIA  
16 United States Attorney for the  
17 Southern District of New York

MARC LITT  
17 DEIRDRE McEVOY  
18 Assistant United States Attorney

18 IVAN FISHER  
19 WILLIAM DAVIS  
20 Attorney for Defendant Vilar

20 GLENN COLTON  
21 JESSICA MARGOLIS  
22 Attorneys for Defendant Tanaka

22 LOEB & LOEB, LLP  
23 Attorneys for Amerindo  
24 EUGENE R. LICKER

25 Also present: Mr. Hockenbury, via telephone  
Eric Glenn, paralegal

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1 that there aren't going to be major privilege issues to be  
2 litigated. There was no privileged litigation with respect to  
3 hundreds of thousands of privileged documents that were --

4 THE COURT: There needs to be reviewed. Forget  
5 litigated. It needs to be reviewed.

6

7 Thank you, Ms. Margolis.

8 Mr. Litt, do you have a view on all of this?

9 MR. LITT: Well, my view is there was a motion  
10 schedule. I don't know why taint wasn't raised in the  
11 initial --

12 THE COURT: Because there has been no ruling.

13 MR. LITT: It doesn't require a ruling. You can write  
14 a paragraph--

15 THE COURT: No. No. No. Because if I had denied the  
16 motions in their entirety, people would have wasted a lot of  
17 time and money make motions for taint that would be like  
18 contingent motions. And to the extent that the motion to  
19 suppress was granted in its entirety, there likely would have  
20 been an appeal to the circuit. To the extent the motion to  
21 suppress was granted in part, it makes the taint a moving  
22 target.

23 So from counsel's standpoint, I don't know how they  
24 file a motion for taint. If you are suggesting it has been  
25 waived, I can't see that that is at all possible.

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1 THE COURT: Ms. Margolis, why don't you talk to  
2 Mr. Litt. If you can't work it out then you will write me a  
3 letter.

4 I am technically challenged as well. There may be a  
5 computer who says my idea is crazy. Talk to the computer  
6 experts. Conceptually, of course -- I know you this,  
7 Mr. Litt -- practically speaking let's see if we can find a way  
8 to get this back what should be returned.

9 You said two things.

10 MS. MARGOLIS: Yes. Another point, this was raised by  
11 Mr. Colton very briefly at the last conference, but there is  
12 another legal issue that we think had been resolved just by  
13 virtue of the state of your Honor's decision, but apparently  
14 there might be some disagreement on that. The issue is what to  
15 do with the evidence that was illegally seized by the  
16 government but falls within the scope of the revised subpoena.  
17 So that is what they have in their possession right now.

18 Our view is the law is very clear that suppressed  
19 items cannot be used at trial. These items were suppressed by  
20 your Honor's decision. They cannot be used at trial. The  
21 government -- speaking of waiving argument -- the government  
22 has not waived an exception to suppression such as, for  
23 example, the inevitable discovery doctrine. That was not  
24 raised in the government's responses to the briefing on the  
25 suppression issues and it hasn't been raised date. They have

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1 the burden on that issue, the burden by a preponderance of the  
2 evidence, they haven't nor can they meet that argument.

3 THE COURT: So the government takes an item that they  
4 weren't entitled to under the search warrant and they return it  
5 to Amerindo, they return it to Mr. Licker. He has this  
6 subpoena that says this document gets turned back over to  
7 government, you think they don't get to use it at trial?

8 MS. MARGOLIS: That is correct. The item is  
9 suppressed. By virtue of serving a subpoena, having a valid  
10 subpoena, that in itself is not sufficient to overcome  
11 suppression to unsuppress suppress the evidence.

12 THE COURT: Well, look, I am not going to decide it  
13 now for the same reason I haven't decided anything else because  
14 I need law. It seems to me that if you want to brief it, then  
15 brief it. If you can't work it out with Mr. Litt and Ms.  
16 McEvoy, I am sorry I not do not mean slight the newest member  
17 of the team, but then you can brief it. I am not going to  
18 decide it now.

19 I understand the difference of opinion and is that  
20 fine. My reaction is that they get it because they get it  
21 under the subpoena, but you will educate to me as to why that  
22 is wrong.

23 MS. MARGOLIS: I know I said two things, this is a  
24 very brief third thing. It would help us in our discussion  
25 with our client if there was -- I note there will not be a